

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
Tampa Division**

UNITED STATES OF AMERICA

v.

Case No. 8:03-CR-77-T-30TBM

SAMI AMIN AL-ARIAN, *et al.*,

Defendants.

_____ /

**SAMIN AMIN AL-ARIAN'S NOTICE OF OBJECTION TO
MAGISTRATE'S ORDER FOR DISCOVERY OF DEFENSE TRANSCRIPTS
AND MEMORANDUM OF LAW**

COMES NOW the Accused, Sami Amin Al-Arian, through his attorney, pursuant to the Court's Order of September 9, 2004 (Doc. 617) hereby objects to the Magistrate's Order of August 18, 2004, (Doc. 605) compelling the defense to provide to the government, *pretrial*, translations which the defense will seek to offer in rebuttal or all other English language translation transcripts of intercepted communications which the defense may seek to introduce in its case in chief and in support thereof states the following:

1. On August 18, 2004, the Magistrate entered an Order which provides, in pertinent part, as follows:

On or before December 31, 2004, any counter translations which the defendants will seek to offer in rebuttal to the government's translations shall be provided to the Government. Additionally, by this date, all other transcripts reflecting English language translations of intercepted communications which any Defendant seeks or may seek to introduce in his case in chief shall be provided to the Government. See Doc. 605.

2. During the recent discovery conference, the Government represented it contemplated producing approximately three hundred (300) transcripts of Arabic to English translations resulting from FISA wiretaps.
3. Most of the anticipated transcripts will contain communications described in the over two hundred fifty (250) Overt Acts as set out in Count One.

Approximately 200 of these operative Overt Acts were allegedly committed by or bear reference to Dr. Sami Al-Arian; of these, approximately 100 overt acts comprise telephone calls and another 79 comprise facsimiles, the overwhelming majority of which are in the Arabic language.
4. At the last court conference, the defense, as an example, challenged the accuracy of a translated conversation involving Dr. Al-Arian, which was translated by two different FBI interpreters. One interpreter added language, which was highly inflammatory, i.e. “suicide bombers”; the other interpreter translated the conversation without those words, which rendered it innocuous. Not surprising, the government chose to use the more prejudicial, although inherently suspect, translation.
5. This example is illustrative of the challenges the defense expects to raise regarding the accuracy and integrity of such translations. However, the manner in which the defense chooses to attack such translations can vary, according to trial strategy. Before any admission into evidence, the government must first lay a proper foundation subject to defense examination. Cross examination of the government’s witness/translator, impeachment of witnesses, or the defense case itself can provide different avenues of challenge

to the integrity of the translations. The defense should therefore not be compelled, pretrial, to decide upon a trial strategy in order to comply with the Court's discovery order. This process is not mandated by case authority or the Rules of Criminal Procedure.

6. The government has represented numerous times over the last 11 months that they intended to supercede the filed indictment. At the most recent discovery conference, Assistant United States Attorney, Terry Zitek, in response to the question of the timing of this event answered it would be "sooner than later". That was on August 17th, 2004.
7. The Accused should certainly not be compelled to produce any transcripts before the superceding indictment and further reserves all objections until such time as a superceding indictment has been filed.
8. Therefore, on those grounds and others, we object to the Magistrate's Order requiring production of defense transcripts by December 31st, 2004.

WHEREFORE, the Accused, Sami Amin Al-Arian, by and through undersigned counsel, respectfully submits the foregoing objections to the Magistrate's Order of August 18, 2004 (Doc. 605).

MEMORANDUM OF LAW

Objection to Defense Production Prior to Trial

The Court has ordered that the defense produce to the government all English-language transcripts it intends to offer in rebuttal to the government's translations or otherwise use in its case-in-chief by December 31, 2004. Doc. 605 at 2-3. In *United States v. Le*, 256 F. 3d 1229, the Eleventh Circuit adopted a procedure to be used when transcripts which are intended to be introduced at trial are disputed or contrary from the 5th Circuit case of *United States v. Onori*, 535 F. 2d 938.

Initially, the district court and the parties should make an effort to produce an "official" or "stipulated" transcript, one which satisfies all sides. If such an "official" transcript cannot be produced, then each side should produce its own version of a transcript or its own version of the disputed portions. In addition, each side may put on evidence supporting the accuracy of its version or challenging the accuracy of the other side's version. *Id* at 1238.

If no transcript can be agreed upon, then the jury must resolve as a factual issue which of the competing transcripts should be accepted as accurate. *Onori*, 535 F.2d at 948.

However the case law does not further outline the requirements for *when* the defense must produce to the government its own transcripts. Instead, the procedure is designed to determine whether a stipulated or official transcript can be agreed to by the parties prior to trial. Since the defense has not yet received any of the government's transcripts, the defense does not yet know whether it will be possible to arrive at an official transcript. It is

anticipated that there will be numerous disputes, as illustrated above, either in whole or part concerning the government's translations, and therefore two versions of translations will be presented to the jury, which they are entitled to view. *Onori*, 535 F.2d at 948.

However, the Court's Order goes further than the Eleventh Circuit case law, requiring that the defense provide to the government its transcripts **before** trial, whether these transcripts are intended to be offered to counter the government translations, in cross examination, in impeachment, or otherwise introduced in the defense's case-in-chief. There are legal and practical problems with this process.

First, the defense is not required to provide its transcripts that it intends to use at trial to the government prior to the government's case. In particular, the Accused is not required to provide his own statements to the government. While the government is required to produce the defendant's oral and written statements under Federal Rule of Criminal Procedure 16(a)(1)(A) and (B), this disclosure is not subject to the defendant's reciprocal discovery obligations. *See* Fed. R. Crim. P. 16(b)(1)(A), (B) & (C). The Accused is also not obligated to provide to the government statements made to him by defense witnesses or prospective defense witnesses, or "reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense." Fed. R. Crim. P. 16(b)(2). Finally such an

order would violate the Accused's constitutional rights under the Fifth and Sixth Amendments to the United States Constitution.

The defense understands the concern of the Court about the government not being unfairly surprised at trial. The Accused would be amenable to providing the government with transcripts he intends to use at trial by a reasonable period of time prior to being introduced.

Dated: 15 September 2004

Respectfully submitted,

/s/ Linda Moreno
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of September, 2004, a true and correct copy of the foregoing has been furnished, by CM/ECF, to Walter Furr, Assistant United States Attorney; Terry Zitek, Assistant United States Attorney; Kevin Beck, Assistant Federal Public Defender, M. Allison Guagliardo, Assistant Federal Public Defender, counsel for Hatim Fariz; Bruce Howie, Counsel for Ghassan Ballut, and by U.S. Mail to Stephen N. Bernstein, P.O. Box 1642, Gainesville, Florida 32602, counsel for Sameeh Hammoudeh.

/s/ Linda Moreno
Linda Moreno
Attorney for Sami Al-Arian